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8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION
11

12 KELLYTOY (USA), INC., a California
corporation; and KELLYTOY
13 WORLDWIDE, INC., a California
corporation;

14 Plaintiffs,

15 vs.

16 DAN-DEE INTERNATIONAL, LTD.,
17 a Delaware corporation; RITE AID
CORPORATION, a Delaware
18 corporation, and DOES 1 through 10,
inclusive,

19 Defendants.
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Case No.

COMPLAINT FOR:

- 1. FEDERAL COPYRIGHT INFRINGEMENT (17 U.S.C. § 501);**
- 2. FEDERAL TRADEMARK INFRINGEMENT, FALSE DESIGNATION OF ORIGIN AND FALSE DESCRIPTION (15 U.S.C. § 1125);**
- 3. COMMON LAW TRADEMARK INFRINGEMENT**
- 4. CALIFORNIA COMMON LAW UNFAIR COMPETITION; AND**
- 5. CALIFORNIA STATUTORY UNFAIR COMPETITION**

DEMAND FOR JURY TRIAL

1 Plaintiffs KELLYTOY (USA), INC., a California Corporation and
 2 KELLYTOY WORLDWIDE, INC., a California Corporation (collectively,
 3 “Kellytoy”) bring this action against defendant DAN-DEE INTERNATIONAL,
 4 LTD., a Delaware corporation (“Dan-Dee”), RITE AID CORPORATION, a
 5 Delaware corporation (“Rite Aid”), and DOES 1 through 10 (collectively,
 6 “Defendants”) for injunctive relief and damages under the laws of the United States
 7 and the State of California as follows:

8 **JURISDICTION AND VENUE**

9 1. This action arises under the copyright laws of the United States, 17
 10 U.S.C. § 101 *et seq.*, the trademark laws of the United States, 15 U.S.C. § 1125(a),
 11 and under the statutory and common law of trademark/trademark infringement and
 12 unfair competition.

13 2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1338, and 1367,
 14 and 15 U.S.C. §§ 1116, 1117, 1121, and 1125.

15 3. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391 and
 16 1400(a).

17 4. This Court has personal jurisdiction over Defendants, as Defendants are
 18 doing business in California and this District and are subject to the jurisdiction of
 19 this Court. Indeed, defendant Dan-Dee actively distributes plush toys throughout
 20 the state of California and this District. Similarly, defendant Rite Aid has numerous
 21 retail stores within the state of California and this District. In addition, defendants
 22 Dan-Dee and Rite Aid knowingly infringed on Kellytoy’s copyrights and trade
 23 dress, knowing that Kellytoy is a California resident, and thereby purposefully
 24 directed their activities towards California.

25 **NATURE OF THE ACTION**

26 5. This is an action for copyright infringement under the Copyright Act,
 27 17 U.S.C. §§ 101, *et seq.*; and trade dress infringement, trademark infringement,
 28 unfair competition and false designation of origin under the Lanham Act, 15 U.S.C.

1 § 1125(a), California Bus. & Prof. Code § 17200, *et seq.*, and the common law.

2 6. Kellytoy's SQUISHMALLOW branded plush toys ("Squishmallows")
3 – representative samples of which are depicted in **Exhibit 1** hereto – are one of the
4 world's hottest plush toy lines. Kellytoy's Squishmallows feature a highly
5 distinctive and widely recognized trade dress, which Kellytoy pioneered and
6 created. Kellytoy actively markets its Squishmallows through numerous media
7 outlets, including, without limitation, on social media, at tradeshow, through
8 Squishmallows.com, amazon.com, Walmart.com, walgreens.com and target.com,
9 and on Kellytoy's website, depicting images of its proprietary Squishmallows line of
10 plush toys.

11 7. Now that Kellytoy's Squishmallows have exploded in popularity,
12 Kellytoy discovered that defendant Dan-Dee has been manufacturing and offering
13 for sale to Rite Aid knock-off products for distribution within this state and district
14 that infringe Kellytoy's trade dress and copyrighted design in its Squishmallows.

15 8. Accordingly, to prevent and remediate the rampant consumer confusion
16 and misappropriation of Kellytoy's copyrighted design in its Squishmallows
17 resulting from Defendants' unauthorized promotion and sale of the Infringing Plush
18 (defined below), and to compensate Kellytoy for its injuries, Kellytoy seeks
19 immediate and permanent injunctive relief, compensatory damages, disgorgement of
20 Defendants' profits, statutory damages, punitive damages, Kellytoy's reasonable
21 attorneys' fees and expenses, a product recall, and corrective advertising sufficient
22 to address Defendants' wrongdoing.

23 **THE PARTIES**

24 9. Kellytoy (USA), Inc. is a California corporation with its principal place
25 of business located in Los Angeles, California.

26 10. Kellytoy Worldwide, Inc. is a California corporation with its principal
27 place of business located in Los Angeles, California.

28 11. Kellytoy is in the business of developing, manufacturing and selling

1 children's toys including, among other things, plush toys.

2 12. On information and belief, defendant Dan-Dee International, LTD.
3 (“Dan-Dee”) is a Delaware corporation with a place of business in New Jersey.

4 13. Dan-Dee is in the business of manufacturing and selling children's toys
5 including, among other things, plush toys.

6 14. On information and belief, defendant Rite Aid Corporation (“Rite
7 Aid”) is a Delaware corporation with a place of business in Pennsylvania and
8 numerous stores in this judicial district.

9 15. Rite Aid is in the business of owning and operating drug stores and
10 pharmacies throughout the United States and, on information and belief, this District
11 that sell various merchandise, including plush toys bearing third-party trademarks
12 and under its own private label, RITE STUFF.

13 16. The true names and capacities of defendants sued herein as DOES 1-
14 10, inclusive, are unknown to Kellytoy, who therefore sues said defendants by such
15 fictitious names. Kellytoy will amend this Complaint to allege their true names and
16 capacities when the same are ascertained.

17 17. Upon information and belief, at all relevant times mentioned in this
18 Complaint, Defendants, and each of them, were acting in concert and active
19 participation with each other in committing the wrongful acts alleged herein, and
20 were the agents of each other and were acting within the scope and authority of that
21 agency and with the knowledge, consent and permission of one another.

22 **BACKGROUND FACTS**

23 **Kellytoy and Its Protected Intellectual Property Rights**

24 18. Kellytoy is engaged in the business of creating, manufacturing,
25 distributing and selling unique plush toys, including, without limitation, its
26 Squishmallows line of plush under the SQUISHMALLOW brand. (*See, e.g.,*
27 **Exhibit 1.**)

28 19. Kellytoy has been in business for approximately 35 years and in that

1 time has developed a reputation for producing high quality, unique, creative and
2 innovative plush toys that are highly prized in the industry.

3 20. Kellytoy exerts great efforts to promote and preserve its image identity
4 and the image and identity of its high quality plush toys, including by creating
5 distinctive designs and marks for use on its products and seeking U.S. trademark
6 and copyright registrations for such designs and marks, including those at issue in
7 this Complaint.

8 21. In 2016, Kellytoy conceived of and began creating its Squishmallows
9 line of plush toy designs, ultimately marketed in connection with the
10 SQUISHMALLOW trademark, that share common, unique features that distinguish
11 them from the goods of others. These designs are wholly original to Kellytoy and
12 comprise copyrightable subject matter under the laws of the United States.

13 22. Kellytoy has been and is the sole owner of all right, title and interest in
14 and to the copyrights in the individual “characters” in the Squishmallows line and
15 the distinguishing, unique, and recognizable features that are common across the
16 Squishmallows line. From 2016 to the present, Kellytoy has expended large sums
17 of money in developing, advertising and promoting these product designs through
18 the United States. In fact, Kellytoy is spending approximately \$50,000 per month in
19 direct to consumer and business-to-business advertising in connection with its
20 SQUISHMALLOW branded goods.

21 23. Kellytoy sells a broad range of Squishmallows that feature the
22 brand’s iconic trade dress, which is not easily reduced to writing, but includes,
23 without limitation: (1) substantially bell-shaped shaped plush toy animals/characters
24 (i.e. substantially oval in shape with substantially flat bottoms), (2) Japanese-
25 inspired minimalist and whimsical facial features, (3) a velvety velour-like-plush
26 exterior, and (4) stuffed with a “spongy,” memory foam-like stuffing – as more fully
27 depicted in **Exhibit 1** hereto – features common to Kellytoy’s line of Squishmallows
28 (collectively the “Squishmallow Trade Dress”) which are the subjects of numerous

1 United States copyright registrations. The plush designs depicted in **Exhibit 2** – a
2 subset of Kellytoy’s line of Squishmallows – comprise some of Kellytoy’s most
3 popular Squishmallows, which were created by or assigned to Kellytoy (the
4 “Squishmallow Designs”). As set forth in greater detail below, these Squishmallow
5 Designs are the subject of Copyright Registrations issued by the United States
6 Copyright Office, pursuant to 17 U.S.C. §101 *et seq.*

7 24. Continuously and without interruption, beginning in 2016, Kellytoy has
8 expended a great deal of time, effort, and money in the promotion of its
9 Squishmallows. Due to Kellytoy’s unique design, extensive marketing efforts,
10 media coverage, and market penetration, the Squishmallow Trade Dress has
11 acquired distinctiveness in the marketplace when applied to plush toys. Indeed,
12 because of Kellytoy’s extensive promotional activities and widespread display of its
13 Squishmallows directed to the public, and a consequence of Kellytoy’s fair and
14 honorable dealings with its customers, the relevant consuming public has come to
15 recognize and associate plush toys bearing the Squishmallow Trade Dress as high
16 quality goods connected with or offered by a single source, Kellytoy. Squishmallow
17 Trade Dress has valuable goodwill and consumer recognition associated with it and
18 has come to symbolize the valuable goodwill and reputation of Kellytoy.

19 25. In addition to being original and inherently distinctive, the
20 Squishmallow Trade Dress is widely recognized by consumers. A simple Internet
21 search using the Google search engine yields about 120,000 "hits" for the search
22 term "Squishmallow."

23 26. In addition to marketing and selling them through thousands of retail
24 stores nationwide, Kellytoy markets and sells its Squishmallows on its website
25 <squishmallows.com> featuring dozens of copyright-protected photographs of its
26 plush toys and models holding its Squishmallows. Copies of the homepage and
27 other representative pages from <squishmallows.com> are attached as **Exhibit 3**.

28 27. Further adding to their recognizability and secondary meaning in the

marketplace, Squishmallows have been featured in numerous magazines, press articles, reviews, and videos, as set forth in greater detail in **Exhibit 4** hereto, including many mainstream media outlets such as the *Washington Post*, the *Chicago Tribune*, the *Daily Harold*, *Okay! Magazine*, among others. By way of example only, Squishmallows have been also recognized by The *Washington Post* and *Consumer Reports* on their 2017 Holiday Gift Guides; *LA Parent* recognized Squishmallows in its October 2017 issue, under the "Products We Love" section; and, as depicted below, *OK!* Magazine featured Squishmallows in its August 21, 2017 issue, stating "Cuddly as they are cute, they make great couch pals, pillows and bedtime buddies in any home. Collect the whole squad! squishmallows.com."



28. Kellytoy's Squishmallows have also been featured in the October 2017 issues of *L.A. Parent Magazine*, *City Parent Magazine*, and *San Diego Family Magazine* and included in the 2017 gift guides for various publications, including in

1 *The Washington Post*, *The Houston Chronicle*, and *L.A. Parent*.

2 29. Kellytoy's Kellytoy's Squishmallows have also been the subject of
3 numerous industry awards and product recommendation lists, including by the
4 National Parenting Product Awards, Parents' Choice, and TTPM, as more fully set
5 out in **Exhibit 4**. In fact, Kellytoy's Squishmallows were named by *Toy Insider* as
6 one of the "Top Holiday Toys," made the cover the September/October 2017 *Toy*
7 *Book Magazine*, and have been featured in numerous other trade magazines, such as,
8 *Teddy Bear and Friends Magazine* and *Animal Tales Magazine*.

9 30. Kellytoy's Squishmallows have also been the subject of extensive
10 marketing campaigns, including email campaigns, social media posts, and direct to
11 consumer advertising. Kellytoy's Squishmallows currently have more than 18,000
12 Instagram followers, more than 26,000 Facebook followers – more than many
13 longer-existing and well-known plush brands. To its followers, Kellytoy regularly
14 publishes photographs of its Squishmallows. Many of these followers, in turn, share
15 these posts with their friends and social media followers. A copy of Squishmallows
16 Instagram page is attached as **Exhibit 5**.

17 31. In addition, hundreds of well-known YouTube influencers and vloggers
18 have shared and posted images and videos of themselves holding plush toys in
19 Kellytoy's line of Squishmallows products. Tens of thousands of consumers have
20 done the same through numerous media platforms, including, Facebook, Instagram,
21 Pinterest and YouTube. These posts have generated millions of "likes" and "shares."

22 32. Fans have been extremely engaged on social media, including
23 Facebook and Instagram, demonstrating their awareness and affection for Kellytoy's
24 Squishmallows, with the average Squishmallows post likes on Instagram hovering
25 over 1000+ per post and 45-100 average comments per post.

26 33. Kellytoy's Squishmallow website traffic has grown exponentially since
27 its launch in 2017 to an average of 4,313 visits per day.

28 34. Kellytoy's Squishmallows are listed amongst the leading global brands

1 and toys such as Hatchimals, Hasbro, RB, Hot Wheels, NERF, and Spin Master by
2 several industry publications.

3 35. As a direct result of Kellytoy's efforts at promoting and building its
4 brand, Kellytoy's Squishmallows line has exploded in popularity, creating
5 substantial demand for and interest in Squishmallows, and generating enormous
6 goodwill in the Squishmallows brand and the Squishmallows Trade Dress in the
7 United States and around the world. In fact, Kellytoy's Squishmallows are sold
8 through hundreds of retailers including some of the largest retailers in the country,
9 including, approximately 1000 Costco stores, 5,500 Walmart stores, 8,500
10 Walgreens stores, 4,000 Kroger supermarkets and Fred Meyer stores, 2000 Target
11 stores, 900 Party City stores, amongst other outfits such as Dave & Busters, Knotts
12 Berry Farms and numerous others.

13 36. Since the summer of 2017, Kellytoy has sold well in excess of a
14 whopping 5 million (5,000,000) units of Squishmallows with no indication that sales
15 will be slowing down anytime soon. Kellytoy's Squishmallows products
16 embodying the Squishmallows Trade Dress have yielded tens of millions of dollars
17 of sales in the U.S. over the past year.

18 37. In fact, Kellytoy's Squishmallows sold out through Walgreens.com
19 during their Gift of the Week promotion in early November 2017, as well as
20 exceeding all sales goals for the campaign, both online and in stores.

21 38. Because of Squishmallows' massive success and popularity, consumers
22 have come to associate Kellytoy's high-quality Squishmallows plush toys with the
23 Squishmallows Trade Dress and, conversely, have come to recognize the
24 Squishmallow Trade Dress as a designation of source.

25 **Defendants' Unlawful Conduct**

26 39. At the outset, none of the defendants to this action is licensed or
27 otherwise authorized by Kellytoy to market or distribute products bearing or
28 embodying Kellytoy's Squishmallow Designs and/or Squishmallow Trade Dress.

1 40. Upon information and belief, sometime in spring of 2018, notably well
2 after Kellytoy established its reputation in its Squishmallow Trade Dress, Defendant
3 Dan-Dee entered into an agreement with defendant Rite Aid to have Dan-Dee sell
4 and supply to Rite Aid various plush toys bearing substantially similar copies of
5 Kellytoy's Squishmallow Designs and Squishmallow Trade Dress (hereinafter
6 referred to as "Infringing Plush") for distribution by Rite Aid through its United
7 States stores. Photographs of the Infringing Plush bearing Dan-Dee and Rite Aid's
8 trademarks are collectively attached hereto as **Exhibit 6**.

9 41. Upon information and belief, Dan-Dee offered to sell the Infringing
10 Plush to Rite Aid in the United States, corresponded across state lines with Rite Aid
11 in the United States concerning the production, sale, and distribution of the
12 Infringing Plush, and transported samples of the Infringing Plush to Rite Aid in
13 interstate commerce.

14 42. Upon information and belief, Defendants are currently producing in,
15 and intend to import from, China a production run of the Infringing Plush into the
16 United States for the purpose of having the Infringing Plush enter interstate
17 commerce and/or to be transported or used in interstate commerce through the same
18 channels of trade through which Kellytoy sells its Squishmallows plush.

19 43. Upon information and belief, Dan-Dee has agreed to sell the Infringing
20 Plush to Rite Aid at prices that were/are relatively lower than the prices charged by
21 Kellytoy for its Squishmallows plush. Kellytoy is informed and believes that Dan-
22 Dee is able to undercut Kellytoy's sales prices because Dan-Dee has, rather than
23 investing in creating its own designs and identity, copied Kellytoy's proprietary
24 Squishmallow Designs and Squishmallow Trade Dress and because Defendants'
25 Infringing Plush are of inferior quality as compared to Kellytoy's
26 SQUISHMALLOW branded plush.

27 44. In fact, Kellytoy met with buyers from Rite Aid in 2017 during which
28 Kellytoy showed the buyers Kellytoy's Squishmallows line of products together

1 with pricing therefor, after which, Kellytoy suspects that Rite Aid submitted
2 Kellytoy's bid, together with facsimiles of the designs, to defendant Dan-Dee to
3 obtain a competing bid from Dan-Dee for copies thereof.

4 45. Kellytoy is informed and believes that Defendants, without Kellytoy's
5 consent or permission, intend to sell, advertise, promote, display, and distribute, toys
6 bearing Squishmallow Designs and Squishmallow Trade Dress in United States
7 commerce.

8 46. The activities of Defendants in copying, distributing, advertising,
9 selling, offering for sale and otherwise using the Squishmallow Trade Dress
10 embodied in the Infringing Plush – including by wholesalely copying the shape and
11 look – constitute false designation of origin regarding sponsorship of those plush
12 toys and falsely represent to the public that Defendants' plush toys originate from
13 Kellytoy, and/or that Defendants' plush toys have been sponsored, approved or
14 licensed by Kellytoy, or in some way affiliated or connected with Kellytoy. Such
15 activities of Defendants are likely to confuse, mislead, and deceive Defendants'
16 customers, purchasers, and members of the public as to the origin of the toys bearing
17 the Squishmallow Trade Dress, or to cause such persons to believe that Defendants'
18 Infringing Plush and/or Defendants have been sponsored, approved, authorized, or
19 licensed by Kellytoy or in some way affiliated or connected with Kellytoy, all in
20 violation of 15 U.S.C. §1125(a).

21 47. Upon information and belief, the activities of Defendants were done
22 willfully with full knowledge of the falsity of such designations of origin and false
23 descriptions or representations, with the intent to trade on the enormous goodwill
24 Kellytoy has earned in its Squishmallows, and with the intent to cause confusion,
25 and to mislead and deceive the purchasing public into believing that the products
26 Defendants sell are directly sponsored by, authorized, by, associated with, or
27 originate from Kellytoy.

28 48. Defendants, by their unauthorized copying and use of Kellytoy's

1 Squishmallow Designs and Squishmallow Trade Dress, have engaged and will
2 engage in acts of copyright infringement, unfair competition, unlawful
3 appropriation, unjust enrichment, wrongful deception of the purchasing public, and
4 unlawful trading on Kellytoy's good will and the public acceptance of Kellytoy's
5 original works. Defendants activities will damage the reputation, business and good
6 will of Kellytoy nationally and in this judicial district.

7 49. Upon information and belief, unless enjoined by the Court Defendants
8 will continue and further escalate their infringing activities.

9 50. Kellytoy has no adequate remedy at law. Thus said activities of
10 Defendants have caused and, if not enjoined, will continue to cause irreparable,
11 immediate and impending harm and damage to Kellytoy's business, and to the
12 business, business reputation and good will of Kellytoy.

13 **FIRST CAUSE OF ACTION**

14 **(Federal Copyright Infringement -- 17 U.S.C. §501)**

15 (Against all Defendants)

16 51. Kellytoy repeats and realleges each and every allegation above as
17 though fully set forth herein.

18 52. Kellytoy owns a valid copyright in the Squishmallow Designs. The
19 Squishmallow Designs are original, decorative, and non-functional. After having
20 had access to Kellytoy's Squishmallow Designs, Defendants, without authorization
21 from Kellytoy, have designed, manufactured, distributed, advertised, offered for sale
22 and/or sold the Infringing Plush bearing designs that Defendants copied from the
23 Squishmallow Designs.

24 53. All of the Squishmallow Designs were originally created by Kellytoy
25 or were assigned to and are owned by Kellytoy.

26 54. The Squishmallow Designs comprise original works of authorship that
27 may be copyrighted under United States law. In fact, Kellytoy has complied with
28 requirements of Title 17 of the United States Code with respect to the registration of

1 Kellytoy's unicorn and pig Squishmallow Designs depicted in **Exhibit 2**, as
2 evidenced by United States Copyright Registration Nos. VA0002096020,
3 VA0002093075, and VA0002093070, entitling Kellytoy to the exclusive rights and
4 privileges in and to the above-referenced copyrights. These copyright registrations
5 are valid and subsisting.

6 55. Upon information and belief, before and after the date of
7 registration/application of the copyrighted Squishmallow Designs and continuing to
8 date, Defendants have imitated, displayed, reproduced, distributed, and/or created
9 derivative works from the subject matter embodied in the Squishmallow Designs in
10 connection with Defendants' manufacture, promotion, and solicitation and
11 acceptance of orders for the sale of Defendants' Infringing Plush unicorn design
12 depicted in **Exhibit 7**.

13 56. Defendants' acts are in violation of the exclusive rights of the copyright
14 holder to reproduce, distribute, display, and create derivative works from the
15 copyrighted Squishmallow Designs, as articulated in 17 U.S.C. § 106. Defendants
16 have thereby infringed Kellytoy's copyrights in the Squishmallow Designs.

17 57. Such activities and conduct has caused Kellytoy injury for which it is
18 entitled to recover under 17 U.S.C. § 504.

19 58. On information and belief, Defendants' infringing acts were committed
20 with knowledge or in reckless disregard of Kellytoy's exclusive rights in the
21 Squishmallow Designs.

22 59. On information and belief, as a result of Defendants' copyright
23 infringement, they have made substantial profits and gains to which they are not
24 entitled to retain.

25 60. As a direct and proximate result of Defendants' unlawful conduct,
26 Defendants have caused and will continue to cause irreparable injury to Kellytoy,
27 for which Kellytoy has no adequate remedy at law. Unless Defendants are
28 restrained by this Court from continuing their imitation, copying, display,

1 distribution, reproduction and creation of derivative works from the works
2 embodied in the copyrighted Squishmallow Designs, these injuries will continue to
3 occur. Accordingly, Kellytoy is entitled to preliminary and permanent injunctions
4 restraining Defendants' infringing conduct, pursuant to 17 U.S.C. § 502.

5 **SECOND CAUSE OF ACTION**

6 **(Trademark Infringement, False Designation of Origin and False Description --**

7 **15 U.S.C. §1125)**

8 **(Against All Defendants)**

9 61. Kellytoy repeats and realleges each and every allegation of paragraphs
10 1 through 50 above as if fully set forth herein.

11 62. The Squishmallow Trade Dress is non-functional and highly
12 distinctive, and has become associated in the public mind with plush toy products of
13 the highest quality and reputation finding their origin in a single source, Kellytoy.

14 63. Kellytoy owns all right, title and interest in and to the Squishmallow
15 Trade Dress.

16 64. Without Kellytoy's authorization or consent, and having knowledge of
17 Kellytoy's prior rights in the Squishmallow Trade Dress, Defendants have designed,
18 manufactured, distributed, advertised, offered for sale and/or sold and/or will soon
19 commence distribution, advertising, offers for sale, and sale of replicas of the
20 Squishmallow Trade Dress to the consuming public in direct competition with
21 Kellytoy, in or affecting interstate commerce.

22 65. The Infringing Plush designs are confusingly similar to the
23 Squishmallow Trade Dress. Defendants' use of the Squishmallow Trade Dress has
24 caused and, unless enjoined by this Court, will continue to cause a likelihood of
25 confusion and deception of members of the public and, additionally, injury to
26 Kellytoy's goodwill and reputation as symbolized by the Squishmallow Trade
27 Dress.

28 66. Defendants' use and further threatened uses of the Squishmallow Trade

1 Dress thus constitutes trade dress infringement, false designation of origin and
2 unfair competition in violation of 15 U.S.C. § 1125(a).

3 67. As a direct and proximate result of Defendants' unlawful conduct,
4 Defendants have misappropriated Kellytoy's rights in the Squishmallow Trade
5 Dress, as well as the goodwill associated therewith, and have diverted sales and
6 profits from Kellytoy to Defendants. Thus, as a direct and proximate result of
7 Defendants' acts of willful infringement, Kellytoy has suffered and/or will suffer
8 damage to its valuable brand and reputation, and other damages in an amount to be
9 proven at trial, including Defendants' profits and Kellytoy's lost profits.

10 68. Defendants' actions described above will cause, have caused, and will
11 continue to cause irreparable damage to Kellytoy, unless Defendants are restrained
12 by this Court. Kellytoy has no adequate remedy at law with regard to Defendants'
13 infringing conduct. Accordingly, Kellytoy is entitled to a preliminary and
14 permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining
15 Defendants' and their agents, servants, and employees, and all persons acting
16 thereunder, in concert with, or on their behalf, from using Kellytoy's Squishmallow
17 Trade Dress, or any colorable imitation or variation thereof, in connection with the
18 sale and/or marketing of any products.

19 69. Defendants' aforesaid acts are exceptional within the meaning of 15
20 U.S.C § 1117.

21 **THIRD CAUSE OF ACTION**
22 **(Common Law Trademark Infringement)**
23 **(Against all Defendants)**

24 70. Kellytoy repeats and re-alleges each and every allegation of paragraphs
25 1 through 50 and 62 through 65 as though fully set forth herein.

26 71. Defendants have violated Kellytoy's exclusive common law rights in
27 the Squishmallow Trade Dress.

28 72. Kellytoy has continuously used its Squishmallow Trade Dress to

1 identify its goods in California and elsewhere, and to distinguish them from goods
2 of a different origin. As such, Kellytoy has common law rights to the Squishmallow
3 Trade Dress.

4 73. Defendants' acts described above constitute trade mark infringement
5 under the common laws of the United States, including California.

6 **FOURTH CAUSE OF ACTION**

7 **(California Common Law Unfair Competition)**

8 (Against all Defendants)

9 74. Kellytoy repeats and re-alleges each and every allegation of paragraphs
10 1 through 50 and 62 through 65 as though fully set forth herein.

11 75. This claim arises under the common law of the State of California
12 relating to unfair competition.

13 76. Defendants' Infringing Plush incorporate matter constituting
14 reproduction, copies and colorable imitation of Kellytoy's Squishmallow Trade
15 Dress. Defendants' unauthorized use of Kellytoy's Squishmallow Trade Dress
16 constitutes unfair competition, and is likely to cause confusion and mistake in the
17 minds of the trade and the purchasing public as to the source of the parties' products
18 and to cause purchasers to believe Defendants' products are authentic products of
19 Kellytoy when in fact they are not.

20 77. Upon information and belief, Defendants have intentionally
21 appropriated Kellytoy's Squishmallow Trade Dress with the intent of causing
22 confusion, mistake, and deception as to the source of their goods and with the intent
23 of palming off their goods as those of Kellytoy and to place others in the position to
24 palm off their goods as those of Kellytoy. Defendants have thus committed unfair
25 competition under the common law of the State of California.

26 78. By their actions in infringing Kellytoy's Squishmallow Trade Dress,
27 Defendants are improperly trading upon the reputation and good will of Kellytoy
28 and are impairing Kellytoy's valuable rights in its Squishmallow Trade Dress.

80. Kellytoy has no adequate remedy at law. Thus said activities of Defendants have caused, if not enjoined, will continue to cause irreparable harm and damage to the rights of Kellytoy in its Squishmallow Trade Dress and to its business reputation and good will.

FIFTH CAUSE OF ACTION

(Against all Defendants)

8 83. By reason of the foregoing, Defendants have been, and are, engaged in
9 “unlawful, unfair or fraudulent business practices” in violation of California
10 Business and Professional Code Section 17200 et seq.

1 their behalf, from using Kellytoy's Squishmallow Trade Dress, or any colorable
 2 imitation or variation thereof, in connection with the sale and/or marketing of any
 3 products. Kellytoy is further entitled to recover its costs and attorneys' fees incurred
 4 in bringing and prosecuting this action.

5 6 **PRAYER FOR RELIEF**

7 WHEREFORE, Kellytoy prays for judgment against Defendants as follows:

8 1. That Defendants, their officers, members, directors, agents, servants,
 9 employees, successors, licensees, representatives, successors, assigns, and all
 10 persons acting in concert or participation with them, be permanently enjoined and
 11 restrained from:

12 (i) Manufacturing, importing, distributing, advertising, offering to
 13 sell or selling the Infringing Plush or any colorable imitations of
 14 the Squishmallow Designs and/or Squishmallow Trade Dress;

15 (ii) Using the Squishmallow Trade Dress or any confusingly
 16 similar trade dress in connection with plush or other toys;

17 (iii) Using the Squishmallow Trade Dress, or any confusingly
 18 similar mark, in connection with the advertisement, offer to sell
 19 or sale of any toy products;

20 (iv) Using any false designation of origin, or representing or
 21 suggesting directly or by implication that Defendants, or any
 22 brands or other sources identifiers created by Defendants, or
 23 their toys, are affiliated with, associated with, authorized by, or
 24 otherwise connected to Kellytoy, or that Defendants are
 25 authorized by Kellytoy to use the Squishmallow Trade Dress or
 26 Squishmallow Designs;

27 (v) Copying, distributing, displaying or making derivative works of
 28 the Squishmallow Designs;

1 (vi) Engaging in any other activity constituting unfair competition
2 with Kellytoy, or constituting infringement of the
3 Squishmallow Trade Dress or Squishmallow Designs; and

4 (vii) Assisting, aiding, or abetting any other person or business entity
5 in engaging or performing any of the activities referred to in
6 subparagraphs (i) through (vi) above, or effecting any
7 assignments or transfers, forming new entities or associations,
8 or utilizing any other device for the purpose of circumventing
9 or otherwise avoiding the prohibitions set forth in
10 subparagraphs (i) through (vi) above.

11 2. That Defendants be directed to file with the Court and serve on
12 Kellytoy, within thirty (30) days after entry of a final injunction, a report in writing
13 under oath setting forth in detail the manner and form in which Defendants have
14 complied with the injunction.

15 3. That the Court direct any third parties providing services to
16 Defendants in connection with any infringing and/or enjoined conduct, including
17 social media platforms (*e.g.*, Instagram, Facebook, Twitter), online marketplaces
18 (*e.g.*, Alibaba, eBay, Etsy, AliExpress, Amazon, Taobao), online payment
19 providers, including credit card companies (*e.g.*, PayPal, Visa) and other service
20 providers (*e.g.*, Google, GoDaddy, LiveChat, Shopify) to cease providing services
21 to Defendants in connection with the offer for sale and sale of the Infringing Plush
22 or any other products using or embodying the Squishmallow Trade Dress or
23 Squishmallow Designs.

24 4. That Defendants be required to pay Kellytoy such damages as it has
25 sustained as a consequence of Defendants' infringement of the of the Squishmallow
26 Trade Dress and trebling of those damages under 15 U.S.C. § 1117;

27 5. Adjudge that each of the Defendants, by its unauthorized use of
28 Kellytoy's the Squishmallow Trade Dress for plush toys, and such other acts as it

1 may have undertaken relating to the Squishmallow Trade Dress, have violated
2 Kellytoy's rights under 15 U.S.C. § 1125(a), under California state law (including,
3 without limitation, Cal. Bus. & Prof. Code § 17200 *et seq.*), and under common law,
4 and that they have done so willfully and for the purpose of violating Kellytoy's
5 rights and damaging Kellytoy's goodwill and reputation in the Squishmallow Trade
6 Dress;

7 6. Direct Defendants to provide Kellytoy with an identification in writing
8 of any and all entities that are presently using the Squishmallow Trade Dress in the
9 United States on Defendants' behalf and inform them that they must immediately
10 cease such use;

11 7. Direct Defendants to immediately recall any and all merchandise
12 previously provided to any United States entity under the Squishmallow Trade
13 Dress or Squishmallow Designs;

14 8. Enter an order, pursuant to 15 U.S.C § 1118, directing Defendants to
15 deliver for destruction all products, brochures, marketing materials, decals, stickers,
16 signs, prints, packages, receptacles, wrappers, boxes, and advertisements in their
17 possession or under their control, bearing any unauthorized copy of any of the
18 Squishmallow Trade Dress, or any simulation, reproduction, counterfeit, copy,
19 confusingly similar likeness, or colorable imitation thereof, and all plates, molds,
20 matrices, programs and other means of making same;

21 9. Enter an order, pursuant to 17 U.S.C. § 503(a), impounding all of
22 Defendants' products that infringe Kellytoy's copyrights in the Squishmallow
23 Designs, as well as any plates, molds, matrices, programs, or other articles by means
24 of which copies of the works embodied in the Squishmallow Designs may be
25 produced;

26 10. Enter an order, pursuant to 17 U.S.C § 503(b), requiring the destruction
27 of all copies of Defendants' products that infringe Kellytoy's copyright in the
28 Squishmallow Designs, as well as any plates, molds, matrices, programs, or other

1 articles by means of which copies of the works embodied in the Squishmallow
2 Designs may be produced;

3 11. That each Defendant provide Kellytoy in writing with the following
4 information relating to Defendants' goods marketed, advertised, offered for sale, or
5 sold under the Squishmallow Trade Dress or Squishmallow Designs:

6 (i) the name, address and telephone number of each and every United
7 States entity to whom Defendants have made available or otherwise
8 provided any such products; and

9 (ii) a full accounting as to the precise dollar amount of such products made
10 available or provided and the profits recognized by Defendants in
11 connection with such actions;

12 12. Direct Defendants to pay the costs of corrective advertising;

13 13. Direct Defendants to pay Plaintiffs' attorneys' fees and costs incurred
14 in initiating and prosecuting this action;

15 14. Direct Defendants to pay punitive damages and exemplary damages
16 according to proof;

17 15. That Kellytoy recover its actual damages, Kellytoy's lost profits, and
18 Defendant's profits arising from Defendants' conduct complained-of herein;

19 16. That the Court award enhanced profits and treble damages;

20 17. That Kellytoy be awarded statutory damages;

21 18. That Kellytoy be awarded interest, including pre-judgment
22 interest, on the foregoing sums;

23 19. That the Court direct such other actions as the Court may deem just and
24 proper to prevent the public from deriving the mistaken impression that any
25 products or services offered, advertised, or promoted by or on behalf of Defendants
26 are authorized by Kellytoy or related in any way to Kellytoy's products or services;
27 and

28 ///

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand and request a trial by jury of all issues raised that are triable by jury.

Respectfully submitted,

Dated: June 15, 2018

WOLF, RIFKIN, SHAPIRO,
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